# MICHIGAN SUPREME COURT

## *Office of Public Information*

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**MICHIGAN SUPREME COURT SADDLES UP FOR '09-'10 TERM'S FINAL SCHEDULED ORAL ARGUMENTS; HORSE OWNER CLAIMS EQUINE ACTIVITY LIABILITY ACT BARS LAWSUIT AGAINST HIM FOR ALLEGED NEGLIGENCE**

LANSING, MI, May 7, 2010 – A horse owner's liability for injuries caused by a rearing steed is at issue in a case that the Michigan Supreme Court will hear on May 11, as the Court wraps up the final scheduled oral argument session of its 2009-2010 term.

In *Beattie v Mickalich*, the plaintiff claims that the defendant failed to secure his horse properly, and that his alleged negligence led to her injuries. But the defendant – who claims the plaintiff wanted to ride the horse over his objections – invoked the state's Equine Activity Liability Act, which protects "an equine activity sponsor, an equine professional, or another person" from liability "for an injury to or the death of a participant or property damage resulting from an inherent risk of an equine activity." The statute does not prohibit a claim if the defendant "[p]rovides an equine and fails to make reasonable and prudent efforts to determine the ability of the participant to engage safely in the equine activity," or if the defendant "[c]ommits a negligent act or omission that constitutes a proximate cause of the injury, death, or damage." Although the plaintiff contends that she produced sufficient evidence to support her claim under these two statutory exceptions, both the trial court and the Michigan Court of Appeals ruled that the act barred her claim, with the appellate court stating that the "plaintiff was engaged in inherently risky equine activity."

Also before the Court is *People v Waterstone*; at issue is whether the office of the Attorney General can serve as special prosecutor in a case where the defendants include a former judge, who is charged with knowingly allowing perjured testimony to be presented in a criminal case in which she was presiding. The Attorney General's office previously represented the judge when the defendant in that criminal case brought a civil lawsuit against her and others in federal court. The judge argues that the Attorney General has a conflict of interest because of the earlier representation and so is disqualified from prosecuting her.

The remaining five cases involve premises liability, procedural, and criminal law issues. All seven cases are being heard as oral arguments on application. The Supreme Court orders oral arguments on application in cases where the Court is deciding whether to grant leave to appeal or take some other action, such as sending the case back to a lower court for further proceedings. In an oral argument on application, the appellant and appellee each get 15 minutes for argument, rather than the 30 minutes per side in cases where the Court has already granted leave.

Court will be held on **May 11** in the Supreme Court's courtroom on the sixth floor of the Michigan Hall of Justice in Lansing. Oral arguments will begin at **9:30 a.m.** The Court's oral arguments are open to the public.

*Please note: the summaries that follow are brief accounts of complicated cases and may not reflect the way that some or all of the Court's seven justices view the cases. The attorneys may also disagree about the facts, the issues, the procedural history, or the significance of their cases. Briefs in the cases are available online at http://www.courts.michigan.gov/supremecourt/Clerk/MSC_orals.htm. For further details about the cases, please contact the attorneys.*

**Tuesday, May 11**
***Morning Session Only***

**BEATTIE v MICKALICH (case no. 139438)**
**Attorney for plaintiff Trina Lee Beattie:** Otis M. Underwood, Jr./(248) 628-3800
**Attorney for defendant Mark P. Mickalich:** Richard H. Ebbott/(810) 238-0455
**Attorney for amicus curiae Michigan Horse Council:** Carol A. Rosati/(248) 514-9814
**Attorney for amicus curiae Michigan Association for Justice:** Mark R. Bendure/(313) 961-1525
**Trial Court**: Lapeer County Circuit Court
**At issue**: The plaintiff was holding the halter of the defendant's horse when the horse reared up, causing the plaintiff to fall and injure her shoulder and arm. She sued the defendant, alleging negligence. The defendant moved for summary disposition, claiming immunity under the Equine Activity Liability Act (EALA), MCL 691.1661 *et seq*. The trial court granted the defendant's motion and dismissed the plaintiff's lawsuit; the Court of Appeals affirmed. Does the Equine Activity Liability Act bar the plaintiff's cause of action? Must a plaintiff plead in avoidance of the Equine Activity Liability Act? Was it error to exclude consideration of a letter offering an expert opinion?
**Background**: Trina Beattie was holding the lead rope of a horse named Whiskey belonging to Mark Mickalich when the horse reared up; Beattie fell, injuring her arm and shoulder. Beattie sued Mickalich, alleging that he was negligent in failing to secure the horse. According to Beattie, Mickalich invited her to his riding arena and asked Beattie to hold Whiskey's lead rope while he fetched a saddle and other tack; Mickalich did not tie Whiskey to crossties before handing her the lead rope, Beattie said. Mickalich told a different version of events in discovery; he claimed that Beattie wanted to ride Whiskey and that he refused, but that they went to the pasture to see the horse. Mickalich testified that he never surrendered control of the lead, and that Whiskey reared when Beattie grabbed his halter. Mickalich also denied going to get a saddle, and said that Whiskey was not led into the riding arena.

Mickalich moved for summary disposition under MCR 2.116(C)(10), arguing that §3 of the Equine Activity Liability Act barred Beattie's claim. Section 3 protects "an equine activity sponsor, an equine professional, or another person" from liability "for an injury to or the death of a participant or property damage resulting from an inherent risk of an equine activity." The act defines "inherent risk of an equine activity" as "a danger or condition that is an integral part of an equine activity," such as an equine's propensity to behave in certain ways and react in unpredictable ways "to things." MCL 691.1662(f). But there are exceptions to this limitation on liability; the act does not prohibit a claim if the defendant "[p]rovides an equine and fails to make reasonable and prudent efforts to determine the ability of the participant to engage safely in the equine activity," or if the defendant "[c]ommits a negligent act or omission that constitutes a proximate cause of the injury, death, or damage." MCL 691.1665. Beattie argued to the trial court that she had produced sufficient evidence to support her claim under these two statutory exceptions to the immunity granted by the act. She also provided the court with a letter from Timothy Wright at Waverly Farms in Oxford, Michigan. Wright wrote that horses can be unpredictable and, because of their size, dangerous to those around them. He offered his opinion that Whiskey "should have been secured to crossties at a very minimum" before others entered the arena and that any movements around the horse should have been slow and deliberate, with care taken to observe the horse for any indication of its discomfort.

The trial court granted Mickalich's motion for summary disposition, ruling that Beattie's claim was barred by the Equine Activity Liability Act. The Court of Appeals affirmed in a published opinion per curiam. The panel explained: "Viewing the evidence in the light most favorable to plaintiff, it is plain that plaintiff was engaged in inherently risky equine activity. Defendant invited plaintiff to his property so that she could ride Whiskey. Although plaintiff did not mount or ride Whiskey, she held Whiskey's halter and lead rope while defendant attempted to saddle the horse. When defendant hoisted the saddle into the air, the horse got spooked and reared up on its hind legs, resulting in an injury to plaintiff. This is exactly the type of risk that is integral to any equine activity." The appellate panel rejected Beattie's argument that she produced evidence sufficient to establish a statutory exception to the bar on liability. Beattie's failure to plead either exception in her complaint was "fatal" to her claim, and the evidence did not support any exception to the bar on liability, the Court of Appeals said. The court also ruled that the letter from Timothy Wright was inadmissible under the Michigan Rules of Evidence and could not be considered in ruling on Mickalich's motion. Beattie appeals.

**PEOPLE v KADE (case no. 139540)**
**Prosecuting attorney:** Marilyn J. Day/(248) 858-0679
**Attorney for defendant Bernard William Kade:** Dana B. Carron/(734) 502-5680
**Trial Court**: Oakland County Circuit Court
**At issue**: The defendant pled guilty to third-degree fleeing and eluding and to driving with a suspended license at his arraignment. He was informed that the maximum sentence for his fleeing and eluding offense was five years in prison. Thereafter, the prosecutor timely filed supplemental information charging the defendant as a third habitual offender. Based on his habitual offender status, the defendant was sentenced to a maximum term of 10 years in prison. The trial court denied the defendant's motion to withdraw his plea on the ground that he did not enter the plea knowingly and voluntarily because he was not informed of his maximum possible sentence as required by MCR 6.302(B)(2). Must a defendant be informed of the enhanced maximum sentence before entering a plea to satisfy MCR 6.302(B)(2)? Under the circumstances, did the defendant enter the plea knowingly and voluntarily?
**Background**: Bernard Kade pled guilty to third-degree fleeing and eluding, and to driving with a suspended license. Before Kade entered his plea, he was informed that the maximum sentence for his fleeing and eluding offense was five years in prison. Thereafter, the prosecutor timely filed supplemental information charging Kade as a third habitual offender. Based on his habitual offender status, Kade was sentenced to a minimum prison term of two years, six months, and a maximum prison term of 10 years. Kade filed a motion to withdraw his plea on the ground that he did not enter the plea knowingly and voluntarily because he had not been informed of his "maximum possible sentence" as required by MCR 6.302(B)(2). The trial court denied Kade's motion.

Kade then filed an application for leave to appeal to the Court of Appeals. The appeals court granted leave to appeal, but denied relief in an unpublished per curiam opinion. The Court of Appeals acknowledged that MCR 6.302(B)(2) "has been interpreted to mean that a defendant must be advised of the consequences of a plea . . . ." But the necessary disclosure did not extend "beyond informing the defendant of the maximum possible sentence and any mandatory minimum sentence applicable to the charged offense," the Court of Appeals said. In this case, the appeals court held, the trial court satisfied the requirements of MCR 6.302(B)(2) by informing Kade of the five-year statutory maximum penalty for fleeing and eluding. The Court of Appeals rejected Kade's argument that MCR 6.302(B)(2) requires a court to inform an habitual offender of the effect that the habitual status has on the maximum sentence, citing *People v Boatman*, 273 Mich App 405 (2006). Kade appeals.

**PEOPLE v GAYHEART (case no. 139664)**
**Prosecuting attorney:** William E. Molner/(517) 373-4875
**Attorney for defendant Dannie Gayheart:** Dennis M. Powers/(978) 986-4554
**Trial Court**: St. Joseph County Circuit Court
**At issue**: The defendant and his victim both lived in St. Joseph County, Michigan. The evidence tended to show that the defendant killed the victim in an Indiana cornfield, just over the Michigan-Indiana state line. He was convicted of first-degree premeditated murder and felony murder. On appeal, he claimed that the Michigan trial court did not have jurisdiction to try the case. The Court of Appeals held that "territorial jurisdiction" existed under MCL 762.2 and that charges could be brought in Michigan. Did the defendant preserve the jurisdictional issue? Did the Court of Appeals correctly resolve this issue?
**Background**: In September 2005, Rosemary Reinel decided to move to Florida. Dannie Gayheart, who lived in Reinel's apartment complex, heard of her plans and asked Reinel to let him drive with her to Florida. Reinel agreed and withdrew nearly $3,000 from her bank account to pay for expenses along the way and to complete the move to her new home. But, after learning that Gayheart was on parole, Reinel changed her mind about allowing him to join her.

Reinel was last seen alive on September 20, 2005. About six weeks later, her decomposed body was discovered in a northern Indiana cornfield, less than 100 feet from the Michigan-Indiana border. Her skull had been shattered by several sharp blows to the head with a blunt object. Gayheart's roommate reported that he had seen Gayheart on the afternoon of September 20, cleaning hair and a red substance from a pair of pliers, which were similar to pliers that were missing from the utility room of the apartment complex where Reinel and Gayheart lived. Gayheart's roommate also stated that he had seen Gayheart with a big wad of money a couple days later.

The condition of the body, and other evidence surrounding the crime scene, suggested that Reinel was likely murdered in the cornfield on or near the date she disappeared. A fugitive warrant was issued for Gayheart's arrest for having left Michigan contrary to his parole restrictions. Gayheart was ultimately apprehended in Florida, where he was found with Reinel's car. Reinel's blood was found in the trunk, along with zip ties, duct tape, and four lengths of cord tied with slip knots.

Gayheart was charged in Michigan with "open murder" and felony murder, which was based on alternate theories of larceny and kidnapping. The prosecutor filed a pretrial motion, arguing that the Michigan trial court had jurisdiction to try Gayheart for the crimes. Gayheart instructed his attorney not to oppose the motion, and informed the trial court that he wanted to be tried in Michigan. Michigan's territorial jurisdiction statute allows a defendant to be tried in the state if, among other things, "[h]e or she commits a criminal offense wholly or partly within this state" or if the "victim resides in this state or is located in this state at the time the criminal offense is committed." The trial judge instructed the jury to find, as part of its verdict, whether the prosecutor proved "beyond a reasonable doubt that [the victim] was a resident of the State of Michigan, St. Joseph County, at the time of her death, and that the Defendant committed some act toward the commission of the crime while in the State of Michigan, County of St. Joseph . . . ." At the conclusion of a six-day jury trial, the jury found Gayheart guilty of first-degree premeditated murder and felony murder. He was sentenced to life in prison.

Gayheart appealed to the Court of Appeals arguing, among other things, that the Michigan court lacked jurisdiction to try him, because the crime occurred in Indiana. He also argued that the Michigan proceeding violated his due process rights. But the Court of Appeals affirmed his convictions in a published opinion. The Court of Appeals was not persuaded that the exercise of territorial jurisdiction on the basis of the victim's residency alone would be constitutional. But, the appellate court concluded, there was sufficient evidence to allow a rational trier of fact to find, beyond a reasonable doubt, that at least one element of both felony murder and first-degree murder

had been committed within the state, and that this finding was sufficient to confer territorial jurisdiction under MCL 762.2(1)(a). The appeals court also held that application of Michigan's territorial jurisdiction statute to Gayheart's conduct did not violate Gayheart's constitutional right to due process. The Court of Appeals rejected Gayheart's remaining issues and affirmed his convictions. Gayheart appeals.

**PEOPLE v CAMP (case no. 139984)**
**Prosecuting attorney:** Jonathan L. Poer/(517) 264-4640
**Attorney for defendant Douglas Eugene Camp:** F. Martin Tieber/(517) 339-0454
**Attorney for amicus curiae Prosecuting Attorneys Association of Michigan:** Joel D. McGormley/(517) 373-4875
**Trial Court**: Lenawee County Circuit Court
**At issue**: The defendant was charged with multiple counts of criminal sexual conduct involving his nephew, in both Livingston and Lenawee Counties. He was found not guilty of the charges brought to trial in Livingston County. At the Lenawee County trial, a witness referred to the Livingston County case in response to a question from the prosecutor. After conferring with the prosecutor and defense counsel, the trial court granted a mistrial. The defendant then moved to dismiss the charges, arguing that constitutional double jeopardy principles precluded him from being tried a second time. He argued that there was no manifest necessity for a mistrial and that he did not consent to it. The trial court denied the motion and the defendant was eventually convicted of one count of second-degree criminal sexual conduct. On appeal, the Court of Appeals reversed the defendant's conviction, holding that the retrial did violate the defendant's constitutional rights. Was the Court of Appeals correct in ruling that the defendant did not consent to the mistrial? Was the Court of Appeals correct in ruling that the mistrial was not supported by manifest necessity?
**Background**: Douglas Camp was charged in Lenawee County with multiple counts of first-degree and second-degree criminal sexual conduct after he allegedly abused his 12-year-old nephew during a camping trip. Additional criminal sexual conduct charges were brought against Camp in Livingston County, involving the same boy and his younger brother. A Livingston County jury acquitted Camp of all charges.

When the Lenawee County charges were brought to trial, the prosecutor called the boy's mother to testify. In response to a question from the prosecutor, the witness referred to the "trial in Livingston County." Camp's attorney immediately requested a bench conference, objecting that the witness suggested to the jury that Camp had been charged with sexual abuse in another county. Defense counsel first asked for a mistrial, and then asked that the jury be informed that Camp was acquitted in Livingston County. The prosecutor objected that it would be too prejudicial to the prosecution to inform the jury of Camp's earlier acquittal. After additional discussion with the attorneys, the trial court granted a mistrial, in order to obtain a "clean trial."

Camp then moved for dismissal of the charges, arguing that double jeopardy considerations prevented him from being tried a second time. Under the Double Jeopardy Clauses of the U.S. and Michigan constitutions, a defendant may not be tried twice for the same offense. In a jury trial, jeopardy attaches when the jury is selected and sworn in; once jeopardy attaches, a defendant has a constitutional right to have his case decided by that tribunal. As a general rule, when a mistrial is declared, retrial is permissible under double jeopardy principles only when: (1) there was "manifest necessity" to declare the mistrial, or (2) the defendant consented to the mistrial. The trial court denied Camp's motion to dismiss, concluding that Camp consented to the mistrial and that there was manifest necessity to declare a mistrial. When he was tried a second time, Camp was convicted of one count of second-degree criminal sexual conduct.

Camp appealed to the Court of Appeals, which reversed his conviction in an unpublished opinion per curiam. The Court of Appeals concluded that Camp did not consent to the mistrial, and

that there was not manifest necessity for a mistrial. On this second point, the Court of Appeals concluded that the prejudice caused by the witness's testimony was attributable to the prosecutor, and that a curative instruction that did not mention the outcome of the Livingston County trial could have cured the prejudice to the defendant. Even if the curative instruction did mention the outcome of the trial, the prosecutor did not show that such an instruction would be so prejudicial as to require a mistrial, the appeals court held. Under the circumstances, retrial violated Camp's constitutional double jeopardy protections, the Court of Appeals said. The prosecutor appeals.

**PEOPLE v SZALMA (case no. 140021)**
**Prosecuting attorney:** Joshua D. Abbott/(586) 469-5350
**Attorney for defendant George Michael Szalma:** Patricia A. Maceroni/(586) 463-8530
**Trial Court**: Macomb County Circuit Court
**At issue**: The defendant was charged with first-degree criminal sexual conduct. After hearing the prosecution's case, the trial judge granted a directed verdict of acquittal. The judge concluded that the evidence was not legally sufficient for a jury to find beyond a reasonable doubt that the charged crime was committed. The Court of Appeals reversed, concluding that the trial judge had engaged in improper credibility determinations. Did the Court of Appeals violate the defendant's right against double jeopardy by overturning the trial court's directed verdict of acquittal?
**Background**: George Szalma and Rachael Frevik had two sons together, and then separated in 2005. Frevik had physical custody of the children, but Szalma had visitation rights every other weekend. It is alleged that, during one of these visits, Szalma penetrated his four-year-old son's anus with his hand. According to the child, Szalma "put his hand inside my butt" when they were together in the bathroom. Asked "what part of papa's hand went inside of your butt," the child replied, "the whole thing" and that it felt "[n]ot good." Frevik reported that she noticed the boy tugging at his bottom and thought that the area appeared to be irritated. She took the child to the hospital, where a nurse practitioner confirmed that there was some irritation. The boy told the examining physician that his father "touched his butt" in the bathroom and that his "butt was sore." The physician reported the incident to Children's Protective Services, and a second physician examined the child. This physician did not observe any signs of penetration.

At trial, the prosecutor presented the testimony of the child, Frevik, the two examining physicians, and two police officers who were involved in the case. At the conclusion of the prosecutor's proofs, the defense attorney moved for a directed verdict of acquittal. The trial judge granted the motion, stating that the evidence was not sufficient to support a reasonable jury's determination that the charged crime had been committed. The judge explained in part: "It would have to be logical on this record, that there would be something on the record to indicate that the defendant, I guess, did this, in a criminal trial with that mind set, that it was for sexual purposes, that there is not another just a logical explanation. I'm not seeing that on this record. . . . But, a criminal trial, based on this record, even in the light most favorable to the nonmoving party, I don't find that a reasonable jury could find beyond a reasonable doubt that the crime was committed as charged."

The prosecutor appealed to the Court of Appeals, arguing that the trial court's decision amounted to an improper determination of witnesses' credibility, rather than a finding that the evidence was insufficient to support a guilty verdict. In an unpublished per curiam opinion, the Court of Appeals reversed the trial court's directed verdict and remanded the case to the trial court for retrial. The Double Jeopardy Clauses of the U.S. and Michigan constitutions prohibit a criminal defendant from being tried twice for the same offense, and double jeopardy bars further proceedings after a trial court has granted a directed verdict of acquittal, the Court of Appeals acknowledged. Retrial is not barred, however, when a trial court based its directed verdict on a credibility determination, which is what occurred in this case, the Court of Appeals stated. There was sufficient evidence from which the jury could have found Szalma guilty of the charged crime, the appellate

court said: "The complainant described how defendant manually penetrated his anus while he was bending over, while both were naked in the bathroom. The complainant could not see defendant's hand, but described his pain and discomfort. The accounts of a single witness can suffice to persuade a jury of a defendant's guilt beyond a reasonable doubt. . . . The child's mother also reported observing the child acting as if recently traumatized, and that the boy's buttocks displayed signs of physical distress." Based on this evidence, the jury might reasonably have come to a different conclusion from that of the trial court, if the jury had been allowed to return a verdict, the Court of Appeals concluded. Szalma appeals.

**JANSON v SAJEWSKI FUNERAL HOME, INC. (case no. 140071)**
**Attorney for plaintiff Thomas Janson:** Daryl C. Royal/(313) 730-0055
**Attorney for defendant Sajewski Funeral Home, Inc.:** Sarah E. Robertson/(313) 446-5534
**Trial Court**: Wayne County Circuit Court
**At issue**: On a cold day in early March, the plaintiff slipped and fell on an ice patch in the parking lot of the defendant funeral home. He sued the funeral home based on a premises liability theory, but the trial court dismissed his claim, finding that the funeral home was not liable because the danger of an icy parking lot was "open and obvious" under the circumstances. The Court of Appeals reversed, finding that there were no "visual indicia" to make the plaintiff aware of the hazard. Did the Court of Appeals reach the right result?
**Background**: During the early evening of March 2, 2006, Thomas Janson arrived at the Sajewski Funeral Home to attend a memorial service. Conditions were wintry; there had been light precipitation earlier in the day, and temperatures never rose above freezing. The funeral home's parking lot had been largely cleared of snow and was salted in the morning. The funeral home's manager later testified that he checked the lot at about 3:00 p.m. that day and did not see any ice on the parking lot surface. When Janson arrived at about 6:15 p.m., he parked at the far end of the lot. About three-quarters of the way to the front door, Janson fell and broke his right ankle. Janson later testified that, in the area where he fell, there was a patch of black ice that was five to six feet wide. A friend of Janson's, who was also visiting the funeral home, testified that he too had some difficulty walking through the parking lot, due to patches of ice.

Janson sued the funeral home on a premises liability theory, alleging that it breached its duty to him to keep the parking lot free of ice. The funeral home filed a motion for summary disposition and asked the court to dismiss the case. The funeral home argued that it did not owe a duty to Janson when the alleged dangerous condition of the parking lot was open and obvious. Janson responded that the hazard was not open and obvious because it consisted of "black ice," which is not visible. But the trial court granted the funeral home's motion. Janson had sufficient information available to him, about the weather and the earlier precipitation, to put him on notice that there might be ice in the parking lot, the trial court reasoned.

In a published opinion, the Court of Appeals reversed the trial court, holding that the danger of ice was not "open and obvious" in Janson's case. When black ice is at issue, "ice may be open and obvious under some circumstances when other facts present should have alerted a Michigan resident to the likelihood of the hazard," such as certain kinds of weather conditions or observing other people slipping on a surface, the appellate panel stated. According to the panel, such "visible indicia of an otherwise invisible hazard" were not present in this case. The precipitation had tapered off earlier that day, and both the roads leading to the funeral home and the funeral home's parking lot appeared to be clear of ice, the appellate court noted. "We find nothing in the record to show that plaintiff saw anyone else slip on the parking lot surface, nor do we find any indication that there was any snow around the area where plaintiff fell. Given these facts, it would be inappropriate to apply the open and obvious danger doctrine." The funeral home appeals.

**PEOPLE v WATERSTONE (case no. 140775)**
**Prosecuting attorney:** Anica Letica/(517) 373-1124
**Attorney for defendant Mary M. Waterstone:** Paul C. Smith/(248) 408-2449
**Attorney for amicus curiae Prosecuting Attorneys Coordinating Council and Prosecuting Attorneys Association of Michigan:** Thomas M. Robertson/(517) 334-6060
**Trial Court**: Wayne County Circuit Court
**At issue**: The Attorney General, acting as special prosecutor, has filed four felony charges of misconduct in office against retired Wayne County Circuit Court Judge Mary M. Waterstone, based on her actions as the presiding judge in *People v Aceval*. Earlier, the Attorney General's office represented Waterstone in a civil action in federal court that involved the same facts. Did the Court of Appeals err in holding that the Attorney General is disqualified from acting as special prosecutor because of a conflict of interest under Michigan Rule of Professional Conduct 1.10(a)?
**Background**: In order to protect the identity of a confidential informant, Wayne County prosecutor Karen Plants allowed Inkster police officers and the confidential informant to give false testimony in a criminal proceeding against Alexander Aceval. Plants and the presiding judge, Mary Waterstone, held private conferences where the false testimony was discussed. Waterstone made a record of these meetings, but sealed the record. When Aceval's case was submitted to the jury, the jurors could not agree on a verdict, and the trial court declared a mistrial. Before the case could be retried, Aceval's attorney learned of the confidential informant's identity, and that false testimony had been given in the first trial. Waterstone agreed to disqualify herself from the case, and her successor judge unsealed the record of Waterstone's conversations with Plants. In lieu of proceeding to a second trial, Aceval eventually pled guilty.

While Aceval's criminal case was pending, he sued Waterstone and 13 other defendants in federal court, claiming that they had violated his civil rights. Assistant Attorney General Steven M. Cabadas of the Government Affairs Bureau, Public Employment, Elections, and Tort Division, in Lansing, represented Waterstone in that civil lawsuit. He filed an answer to Aceval's complaint, denying any civil liability on the judge's behalf and asserting various affirmative defenses, including judicial immunity. In March 2008, the federal court dismissed Aceval's lawsuit due to his failure to comply with certain procedural requirements. That lawsuit was never refiled.

The Wayne County Prosecutor decided that, due to a conflict of interest, she could not bring criminal charges regarding the perjury. The prosecutor asked the Michigan Prosecuting Attorneys Coordinating Council to assign a special prosecutor. Prosecutors from Monroe, Oakland, Washtenaw, and Genesee counties declined to pursue the matter. The Attorney General ultimately accepted the prosecution and assigned the case to its Criminal Division, specifically Assistant Attorneys General William Rollstin and John Dakmak. Special Agent Michael Ondejko began a criminal investigation. On November 25, 2008, Ondejko met with Waterstone at her home to conduct an interview and to deliver an investigative subpoena. Ondejko, who recorded the interview, informed the judge that he was "doin[g] an investigation into the perjury that occurred at the Pena/Aceval trial," and that he had a list of about 20 people, including the judge, who would be deposed under investigative subpoenas. At the conclusion of the interview, he served Waterstone with an investigative subpoena ordering her to appear at the Attorney General's office on December 1, 2008. The subpoena advised her of her rights, including the right to counsel and her right against self-incrimination.

Waterstone appeared for the deposition without counsel. Assistant Attorney General John Dakmak advised her that his office was investigating "potential perjury and obstruction of justice" by the Wayne County Prosecutor's office and the Inkster Police Department regarding the Aceval/Pena prosecution. Dakmak confirmed that Waterstone understood her rights, including the right to counsel. Waterstone then stated that her "understanding was this involved the investigation regarding Karen Plants; is that correct?" Dakmak answered: "Involving the investigation surrounding the trial of

Alexander Aceval, Ricardo Pena, Wayne County Prosecutor's Office and the police department." Waterstone stated that was "a little broader" than she understood, and Dakmak added: "Just so you know, we haven't narrowed it down to a defendant. We haven't charged anybody with a crime yet. We're investigating the acts, everything surrounding it. Do you understand?" Waterstone answered that she did understand, and she agreed to answer questions.

On March 24, 2009, the Attorney General filed a felony complaint against Waterstone, Plants, and two Inkster police officers. Waterstone was charged with four counts of common law misconduct in office, punishable under MCL 750.505. Two counts relate to the ex part communications that Waterstone had with Plants; the other two counts assert that Waterstone allowed and concealed perjured testimony.

After the charges were filed, Waterstone filed a motion to disqualify the Attorney General's office, alleging that Cabadas' earlier representation of her in the federal civil litigation amounted to a conflict of interest that disqualified the Attorney General from proceeding with the prosecution of this criminal action. The district court denied her motion, as did circuit court on appeal. On remand from the Supreme Court, the Court of Appeals issued a published per curiam opinion that reversed the district court. The appeals court held that an "insurmountable conflict of interest" existed, pursuant to Michigan Rule of Professional Conduct 1.10, and that Waterstone was not adequately consulted about the conflict. Under the unique circumstances of this case, the appeals court held, the Attorney General was disqualified. The Court of Appeals directed the Attorney General to withdraw from the prosecution of the case. The Attorney General seeks leave to appeal.

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